STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
BARBARA J. FRANZ ,	)	Charge No. 2003CA3218
Complainant,	)	EEOC No. 21BA323053
	)	ALS No. 05-135
and	)	
	)	
SBC MIDWEST INDUSTRY MARKETS,	)	
Respondent.	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision, the Complainant's Exceptions filed thereto, and the Respondent's Response to the Complainant's Exceptions.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

IT IS HEREBY ORDERED:

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on **July 6, 2009**, has become the Order of the Commission.

STATE OF ILLINOIS)
) **Entered this 21st day of October 2009**
HUMAN RIGHTS COMMISSION)

Commissioner Marti Baricevic

Commissioner Gregory Simoncini

Commissioner Robert S. Enriquez

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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BARBARA J. FRANZ,	)	
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Complainant,	)	
	)	**Charge No.: 2003CA3218**
and	)	**EEOC No.: 21BA32053**
	)	**ALS No.: 05-135**
SBC MIDWEST INDUSTRY MARKETS,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

On April 12, 2005, the Illinois Department of Human Rights (IDHR) filed a complaint on behalf of Complainant, Barbara J. Franz. That complaint alleged that Respondent, SBC Midwest Industry Markets, discriminated against Complainant on the bases of her age and a mental handicap when it discharged her. (After the complaint in this matter was filed, the Illinois Human Rights Act was amended to change the term "handicap" to "disability." Since the transcript and briefing in this matter use the older terminology, in the hope of avoiding confusion, that terminology is used in this recommended order.)

This matter now comes on to be heard on Respondent's Motion for Summary Decision. Complainant filed a written response to the motion, and Respondent filed a written reply to that response. The matter is ready for decision.

The IDHR is an additional statutory agency that has issued state actions in this matter. The department is therefore named herein as an additional party of record.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was

viewed in the light most favorable to Complainant.

1. Complainant, Barbara J. Franz, worked for Respondent, SBC Midwest Industry Markets, for a number of years.

2. In December of 2001, Complainant received a good job evaluation. At the time of that evaluation, Complainant's position was Service Manager – Select Local. Complainant's supervisor in that job was Ann Westcott.

3. From December of 2001 until May of 2002, Complainant was on a medical leave of absence.

4. Complainant had been diagnosed with depression and bipolar disorder. In approximately January of 2002, Complainant told Westcott about that diagnosis.

5. From the time of her return to work in May of 2002 until July 27, 2002, Respondent accommodated Complainant's condition by allowing her to work a four-hour work day.

6. After July 27, 2002, Respondent refused Complainant's request to work a six-hour work day as an accommodation. Complainant returned to full-time work.

7. In July of 2002, as a result of a work force reduction, Complainant was transferred to a position of Marketing Support Manager in Respondent's Industry Markets business unit. In that position, she reported to Don Thompson, Director of Local Interconnection Services.

8. Don Thompson reported to Thomas Harvey, Vice President of Local Interconnection Service.

9. In approximately October of 2002, Respondent began implementing another reduction in force (RIF). As part of that implementation, the "first level" managers in Harvey's organization, including Complainant, were evaluated and ranked according to their performance, skills, experience, and training.

10. After Complainant was evaluated and ranked according to Respondent's criteria, she was designated as "surplus" and thus expendable in the RIF.

11. Although he relied on his Directors to handle the ranking of the managers in Complainant's peer group, Harvey was the final decision maker with respect to Complainant's selection for layoff.

12. At the time Complainant was designated as surplus, Thompson was aware of Complainant's diagnosis.

13. Ann Westcott was not involved in the decision to select Complainant for layoff.

14. Complainant was given thirty days to search for another job within the company. She was unsuccessful in that search.

15. Complainant was discharged on or about December 13, 2002.

16. At the time of her discharge, Complainant was 57 years old.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant cannot establish a *prima facie* case of discrimination against her on the basis of her age.

4. Complainant cannot establish a *prima facie* case of discrimination against her on the basis of a mental handicap.

5. Respondent can articulate a legitimate, non-discriminatory reason for its actions.

6. There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.

7. A summary decision in Respondent's favor is appropriate in this case.

DISCUSSION

Complainant, Barbara J. Franz, worked for Respondent, SBC Midwest Industry Markets, for a number of years. In December of 2001, she received a good job evaluation. At the time of that evaluation, Complainant's position was Service Manager – Select Local. Her supervisor in that job was Ann Westcott.

From December of 2001 until May of 2002, Complainant was on a medical leave of absence because she had been diagnosed with depression and bipolar disorder. In approximately January of 2002, Complainant told Westcott about that diagnosis.

From the time of her return to work in May of 2002 until July 27, 2002, Respondent accommodated Complainant's condition by allowing her to work a four-hour work day. After July 27, 2002, Respondent refused Complainant's request to work a six-hour work day as an accommodation and she returned to full-time work.

In July of 2002, as a result of a work force reduction, Complainant was transferred to a position of Marketing Support Manager in Respondent's Industry Markets business unit. In that position, she reported to Don Thompson, Director of Local Interconnection Services. Thompson reported to Thomas Harvey, Vice President of Local Interconnection Service.

In approximately October of 2002, Respondent began implementing another reduction in force (RIF). As part of that implementation, the "first level" managers in Harvey's organization, including Complainant, were evaluated and ranked according to their performance, skills, experience, and training. At the conclusion of that process, Complainant was designated as "surplus" and thus expendable in the RIF.

As part of that RIF, Complainant was discharged on or about December 13, 2002. At the time of her discharge, Complainant was 57 years old.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent discriminated against Complainant on the bases of her age

and a mental handicap when it discharged her.

As a general rule, allegations of discrimination are analyzed using a three-part method. First, the complainant must establish a *prima facie* showing of discrimination. Is she does so, the respondent must articulate a legitimate, non-discriminatory reason for its actions. For the complainant to prevail, she must then prove that the respondent's articulated reason is pretextual. ***Zaderaka v. Human Rights Commission***, 131 Ill 2d 172, 545 NE2d 684 (1989). *See also* ***Texas Dept of Community Affairs v. Burdine***, 450 US 251 (1981).

This matter is being considered pursuant to Respondent's Motion for Summary Decision. A summary decision is analogous to a summary judgment in the Circuit Court. ***Cano v. Village of Dolton***, 250 Ill App 3d 130, 620 NE2d 1200 (1st Dist. 1993). Such a motion should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. ***Strunin and Marshall Field & Co.***, IHRC, 536 (L), March 3, 1983. The movant's affidavits should be strictly construed, while those of the opponent should be liberally construed. ***Kolakowski v. Voris***, 76 Ill App 3d 453, 395 NE2d 6 (1st Dist. 1979). The movant's right to a summary decision must be clear and free from doubt. ***Bennett v. Raag***, 103 Ill App 3d 321, 431 NE2d 48 (2d Dist. 1982).

In this matter, Complainant has brought two claims, age and mental handicap. Those theories require somewhat different *prima facie* cases.

To establish her *prima facie* case of age discrimination, Complainant would have to establish four elements. She would have to show 1) that she was a member of a protected class, 2) that she was meeting Respondent's reasonable performance expectations, 3) that she was discharged, and 4) that similarly situated younger employees were treated more favorably. ***Southern Illinois Clinic, Ltd. v. Human Rights Commission***, 274 Ill App 3d 840, 654 NE2d 655 (5th Dist. 1995).

There is no doubt that Complainant can establish the first three of those elements. She

was 57 years old when she was laid off, easily within the protected age class. It is also clear that she was meeting Respondent's reasonable performance expectations. Although it was not for the job from which she was laid off, her most recent job evaluation was good. Moreover, Respondent's records indicate that Complainant was eligible for rehire, which would have been unlikely if she had been failing to meet expectations. Finally, she clearly was laid off, which counts as a discharge.

The problem is that Complainant offered no proof that similarly situated younger employees were treated more favorably than she was. Her only attempt at such proof was to offer her own personal opinion that she was better qualified and a better performer than Linda Stuart Green. That opinion, though, is insufficient to even raise a genuine issue of material fact on the issue. The issue, after all, is whether Complainant should have scored higher than Green on the criteria used by Respondent. Complainant's opinion sheds no light on that issue. Moreover, there were two employees laid off at Complainant's level. If she would have scored higher than only one person in her group, that would not have spared her from the RIF.

In her response to Respondent's motion, Complainant effectively admits that the record has no evidence of comparable co-workers. However, she does so in a way that misstates the burden of proof on the issue. On page 7 of her response, Complainant asserts that "[t]here are no facts set forth about those retained so that they can be compared." She suggests, though, that the lack of such information is a failure by Respondent. In fact, it is Complainant who bears the burden of proving that there were comparable co-workers who were treated more favorably. Her failure to do that is devastating to her *prima facie* case.

In short, Complainant has offered no useful evidence on favorable treatment given to similarly situated co-workers. Thus, it appears that she cannot establish the fourth element of her *prima facie* of age discrimination.

Complainant fares no better on her claim of handicap discrimination. To establish a

prima facie case of handicap discrimination, Complainant would have to establish three elements. She would have to show 1) that she is handicapped under the Act, 2) that Respondent took an adverse action against her relating to her handicap, and 3) that her handicap is unrelated to the performance of her job duties. ***Habinka v. Human Rights Commission***, 192 Ill App 3d 343, 548 NE2d 702 (1st Dist. 1989); ***Kenall Mfg. Co. v. Illinois Human Rights Commission***, 152 Ill App 3d 695, 504 NE2d 805 (1st Dist. 1987).

Complainant can prove two elements without too much trouble. For purposes of this motion, there is no problem with viewing her condition as a handicap under the Act. Moreover, in light of her assertion that proper medication kept her symptoms in check, she should be able to establish that her condition is unrelated to the performance of her job duties. Thus, she should be able to prove the first and third elements of her *prima facie* case. She can also prove that Respondent took an adverse action against her, in that the company laid her off. On the existing record, though, there is no basis to find that the adverse action, the layoff, was related to Complainant's handicap.

Certainly, Respondent was aware of Complainant's condition. There were numerous communications between her doctor and Respondent's human resources people. Furthermore, Complainant had taken a leave of absence and was working abbreviated days as an accommodation for her condition for several months during the year of the RIF. Harvey, the ultimate decision maker, asserts that he was unaware of the condition, and that may well be true. Nonetheless, Harvey conceded that he relied upon his subordinates for rating the possible layoff candidates. Complainant's immediate supervisor, Thompson, was aware of at least the outlines of her situation. That, though, does not establish that the discharge was related to the condition.

Complainant assumes that Harvey is lying about not knowing about her condition. She then argues that, because Respondent lied about its level of knowledge, it is lying about the

reason for her layoff. That argument proves too much. It is Complainant's burden to provide some evidence to link her condition to Respondent's decision and she failed to meet that burden. In essence, Complainant is arguing that, because the company knew about her condition, that condition was the reason for her layoff. That simply is not the law. Without a link between the handicap and the layoff, Complainant cannot establish the second element of her *prima facie* case of handicap discrimination.

The failure to establish a *prima facie* case is not necessarily fatal to Complainant's case. That is because Respondent provided documentation that articulated a legitimate, non-discriminatory reason for its actions. Once a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. ***Clyde and Caterpillar, Inc.***, IHRC, 2794, November 13, 1989, *aff'd sub nom* ***Clyde v. Human Rights Commission***, 206 Ill App 3d 283, 564 NE2d 265 (4th Dist. 1990).

Respondent's articulated reason is that Complainant's performance was not good enough when compared to her peer group. According to the affidavit from Harvey, the decision maker, Complainant and her peers were rated and ranked on their performance, skills, experience, and training. According to Harvey, Complainant fell behind her peers on those rankings. To prevail after a public hearing in this case, Complainant would have to prove that Respondent's articulated reason is pretextual. To justify denial of Respondent's motion, she only had to prove that there is a genuine issue of material fact on the issue of pretext. She failed to meet that burden.

Complainant cited a number of complimentary remarks made about her in her most recent job evaluation. Those remarks describe a competent, focused, hard-working employee, the type of employee any employer would be delighted to have. They do not, however, raise a genuine issue of material fact on the issue of pretext.

Nobody has claimed that Respondent chose Complainant for layoff because her performance was not good enough to hold a job. On the contrary, it is obvious that Complainant was a good, solid employee and Respondent knew it. This is not a situation in which an employer fired an incompetent employee. Rather, this is a situation in which an employer found itself in a RIF situation and had to choose which of several competent employees would be laid off.

In short, the issue is not one of measuring Complainant against the standard of competence. Instead, the issue is one of measuring Complainant against her peers. Proving that she was a good performer is meaningless unless her performance is compared to the performance of her co-workers. Complainant completely failed to provide any useful comparisons.

Complainant's case was devastated by that lack of evidence on comparable co-workers. Guidance in this area is provided by the case of ***Kindred v. Human Rights Commission***, 180 Ill App 3d 766, 536 NE2d 447 (3d Dist. 1989). In ***Kindred***, the complainant was laid off and claimed discrimination on the basis of age. The respondent's articulated reason was that the retained employees possessed better credentials than the complainant had. The Appellate Court held that it was insufficient for the complainant to prove only that his credentials were superior to those of the retained employees. Instead, in order to prove pretext, the complainant had to prove that his qualifications were so superior to those of the retained employees that the respondent's explanation was unbelievable and had to be construed as a pretext for discrimination.

The ***Kindred*** rationale is controlling in this situation. To prove pretext on the issue of performance and skills, Complainant had to prove that her skills were so superior to those of her retained co-workers that Respondent's explanation is obviously untrue. She presented absolutely no useful proof on that issue.

Complainant has tried to argue that her selection was subjective and therefore pretextual. That argument is meritless. It is arguably true that any evaluation of performance, skills, and experience would be somewhat subjective. It is unquestionably true that subjective criteria are subject to a higher level of scrutiny. *See* ***Allred and Eastern Airlines, Inc.***, IHRC, 2062, March 8, 1988. Nonetheless, there is no rule of law which bars an employer from making a good faith evaluation of its employees' performance and skills when determining which individuals to lay off during a RIF. What Complainant needed to do was show that the subjective criteria masked unlawful discrimination. She did not do that.

In sum, on the issue of pretext, Complainant has failed to provide evidence of a genuine issue of material fact. As a result, there is nothing to call into question Respondent's articulated reason. Thus, a recommended order in Respondent's favor is appropriate in this case.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
MICHAEL J. EVANS
CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: July 6, 2009